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In the
Supreme Court of the United States

OCTOBER TERM, 1962

No. 229

FEDERICO MARIN GUTIERREZ,
PETITIONER,

v.

WATERMAN STEAMSHIP CORP.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petitioner, by his counsel, HARVEY B. NACHMAN, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, which reversed the decree in favor of petitioner and remanded the case to the District Court for the District of Puerto Rico with directions to dismiss the libel and in support of his petition does show:

1. The opinion of the United States Court of Appeals for the First Circuit has not been reported as of this date and is appended hereto at pages 24-29, *infra*. The opinion of the United States District Court for the District of Puerto Rico was not reported and appears in the certified record at pages 12 through 22.

2. The judgment of the United States Court of Appeals for the First Circuit vacating the judgment of the District Court of Puerto Rico and remanding with directions to enter a judgment of dismissal is dated April 11, 1962.

Jurisdiction

The jurisdiction of this Honorable Court to review by way of writ of certiorari is based on United States Code, Title 28, Sections 1254 (1) and 2101 (c) and Supreme Court Rules, Rule 19, Subsection 1(b).

Questions Presented

3. The questions presented for review are:

A. Is a shipowner liable for injuries suffered by a shore-based longshoreman, who was participating in the unloading operations of the ship at the time of injury?

This question comprises the subsidiary questions of (1) whether longshoremen engaged in a ship's service are entitled to the doctrine of unseaworthiness while working on shore as they are while working aboard; and, (2) whether liability of the shipowner extends to injuries occurring on shore proximately caused by unseaworthy cargo aboard or by its negligent discharge.

B. Does the shipowner's liability for negligence terminate at the edge of the pier?

Subsidiary issues comprised in this question include the foreseeability of injury to one not aboard the vessel; the responsibility of the shipowner for situations created ashore even though the area where the injury occurs is not within his power and control; and the scope and the extent of the shipowner's continuing duty to provide a safe place to work.

C. May laches be decreed as a complete bar to recovery, as a matter of law, if the trial court has found as a matter of fact that the respondent was not prejudiced by the delay?

D. Does the Court of Appeals have the power to reverse findings of fact based in whole or in part upon the credibility of the witnesses in an admiralty matter on its own independent reading of the record?

Necessarily contained in this question are the subsidiary questions of whether an appeal in admiralty is a trial *de novo* and whether a court of appeals has the right to reverse the district court's findings if not clearly erroneous and if supported by the evidence.

4. The constitutional provisions involved are:

United States Constitution, Article 3, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority:—to all Cases affecting Ambassadors,

other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The statutes involved are:

Public Law 695 of June 19, 1948 (c) 506, 62 Stat. 496; 46 U.S. Code, Section 740:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided*

further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage."

Laws of Puerto Rico Annotated, Title 11, Section 32:

"In cases where the injury, the occupational disease, or the death, entitling the workman or employee, or his beneficiaries, to compensation in accordance with this chapter, has been caused under circumstances making third parties liable for such injury, disease or death, the injured workman or employee or his beneficiaries may claim and recover damages from the third party liable for said injury, disease, or death, within one year following the date when becomes final the decision of the case by the Manager of the State Insurance Fund, who may subrogate himself in the rights of the workman or employee or his beneficiaries to institute the same action in the following manner:

"When an injured workman or employee, or his beneficiaries in case of death, may be entitled to institute an action for damages against a third person in cases where the State Insurance Fund, in accordance with the terms of this chapter, is obliged to compensate in any manner or to furnish treatment, the Manager of the State Insurance Fund shall subrogate himself in the rights of the workman or employee or of his beneficiaries, and may institute proceedings against such third person in the name of the injured workman or

employee, or of his beneficiaries, within the ninety (90) days following the date on which the decision of the case becomes final and executory, and any sum which as a result of the action, or by virtue of a judicial or extrajudicial compromise, may be obtained in excess of the expenses incurred in the case, shall be delivered to the injured workman or employee or to his beneficiaries entitled thereto. The workman or employee or his beneficiaries shall be parties in every proceeding instituted by the Manager under the provisions of this section, and it shall be the duty of the Manager to serve written notice on them of such proceedings within five (5) days after the action is instituted.

"If the Manager should fail to institute action against the third party liable, as set forth in the preceding paragraph, the workman or employee, or his beneficiaries, shall be fully at liberty to institute such action in their behalf, without being obliged to reimburse the State Insurance Fund for the expenses incurred in the case.

"Neither the injured workman or employee, nor his beneficiaries, may institute any action or compromise any cause of action they may have against the third party liable for the damages, until after the lapse of ninety days from the date on which the decision of the case by the Manager of the State Insurance Fund became final and executory.

"No compromise between the injured workman or employee, or his beneficiaries in case of death, and the third party liable, made within the ninety (90) days following the date on which the decision of the case becomes final and executory, or after the lapse of said term if the Manager has filed his complaint, shall be valid or effective in law un-

less the expenses incurred by the State Insurance Fund in the case are first paid; and no judgment shall be entered in suits of this nature, nor shall any compromise whatsoever as to the rights of the parties to said suits shall be approved, without making express reserve of the right of the State Insurance Fund to reimbursement of all expenses incurred; *Provided*, That the secretary of the court part taking cognizance of any claim of the nature described above shall notify the Manager of the State Insurance Fund any order entered by the court which affects the rights of the parties to the case, as well as the final disposition of said case.

"The Manager of the State Insurance Fund may, with the approval of the Secretary of Labor of Puerto Rico, compromise as to his rights against a third party liable for the damages; *It being understood, however*, That no extrajudicial compromise shall impair the rights of the workman or employee, or of his beneficiaries, without their express consent and approval.

"Any sum obtained by the Manager of the State Insurance Fund through the means provided in this section shall be covered into the State Insurance Fund for the benefit of the particular group into which was classified the occupation or the industry in which the injured or dead workman or employee was employed.—Amended June 15, 1955, No. 76, p. 258, § 2, eff. June 15, 1955."

Statement of the Case

On October 21, 1956, Federico Marín Gutierrez, a longshoreman employed by an independent stevedoring con-

tractor, was injured when he fell on the apron of the pier in Ponce, Puerto Rico, during the course of the unloading of the SS HASTINGS, a vessel owned and operated by the respondent.

The petitioner's duties were performed entirely on shore and he never went aboard the vessel. Prior to his injury, the vessel had discharged torn bags of beans, whose contents were spilled on the apron of the pier. Petitioner, engaged in the discharging operation, slipped on some of the spillage, fell and injured his back. The spillage had been observed while the bags were in midair on drafts attached to the ship's discharging equipment. (R. 23, 76, 77, 78, 152; Exhibit 10, 156 through 164).

Suit was filed in the United States District Court for the Southern District of New York on January 9, 1959. Under the analogous statute of limitations, 11 L.P.R.A. 32, the time to file would have expired on November 30, 1957. The libel specifically pleaded that laches did not apply because of excusable delay and absence of prejudice to the respondent. (R. 6 through 7).

The trial commenced on March 21, 1960. During the pendency of the action, prior to trial, the respondent caused the deposition of the petitioner to be taken and served interrogatories upon the petitioner, which were answered. In the deposition and in the answers to the interrogatories, the petitioner gave the names and addresses of the eye-witnesses but the respondent made no effort to contact the witnesses prior to trial. (R. 151 and 153). The records also indicated the eye-witnesses. (R. 132, 135).

At the conclusion of the trial, the Court stated:

> "Of course, I should advance to counsel, I believe that on the question of unseaworthiness and/or negligence, the libelant has made a case, that as regards the question of laches the libelant has shown sufficient

excuse for the delay, and that the only two questions with which the Court is really concerned are the question of the actual physical damage suffered by libelant as a consequence of the October 21, 1956 accident. Whether his present physical state is totally the result of that accident, or whether the accident aggravated in some way his physical state resulting from the 1951 accident, or whether the 1959 accident aggravated and to what extent the previous physical condition of the libelant.

"I believe that in order to decide that, it is indispensable that the parties get a transcript of the medical testimony in the case, particularly I want to read pretty carefully the testimony of the two main experts, Dr. Rifkinson and Dr. Ramirez de Arellano. Of course, I have no doubt that part of the present condition of the libelant is due to the 1956 accident, but to what extent, and that's the important thing, in order to determine the damages.

"I believe as to the material aspect of the damages I want the parties to discuss that more or less what appears from the evidence as to actual earnings of this libelant, if there is any evidence as to it, because the evidence is very weak in that. That's all I need.

"I believe it isn't necessary to file briefs or discuss the exceptive allegations, and I had the opinion that it would have been factual and unnecessary to discuss those exceptive allegations. They are based precisely on what transpired at the trial. They stand or fall on the evidence offered here, so it is not necessary to make a separate discussion of that. Indeed, I believe that what I have said now disposes of the exceptive allegations." (R. 153-154).

Thereafter, the District Judge filed his opinion, findings of fact and conclusions of law. A specific finding was made that beans had been observed spilling from the drafts that were discharged from the vessel throughout the unloading operation. (R. 18). Another finding was made that the beans scattered about the surface of the pier created a dangerous condition for the longshoreman. (R. 18). It was also found that the cargo being discharged was defective and unseaworthy and that the shipowner was negligent in permitting the broken bags to be discharged and in failing to furnish libellant with a safe place to work. (R. 18-19).

The District Court also found that the respondent had suffered no prejudice as a result of the delay in bringing the action since the payroll records of the stevedoring contractor, produced at the trial by respondent, indicated who were the potential witnesses, all of whom were present at the trial and the respondent itself produced records indicating the cargo damage prior to and at the time of discharge and that medical evidence, including the treating physicians, was also available to respondent. (R. 19).

The United States Court of Appeals for the First Circuit, in reversing, ruled that petitioner as a shore worker was not entitled to the doctrine of unseaworthiness since he was, "not even in a technical sense . . . about to go 'on a voyage' ". (R. 27).

Without any concomitant holding that petitioner was not performing work traditionally performed by seamen or that petitioner was not in the service of the vessel, the Court then held, contrary to the conclusions of the District Court, that respondent was not liable under the doctrine of negligence inasmuch it had neither control of nor even a right to control the place where the accident occurred. (R. 26).

The Court of Appeals also held that the action was barred by laches despite the specific finding by the trial Court that

respondent had suffered no prejudice as a result of the delay.

In its opinion, the Court of Appeals admitted that its holding was in conflict with rulings rendered by several district courts but made no reference to contrary decisions of the courts of appeals of other circuits which had been cited to it by both petitioner and respondent.

Argument

A. In Deciding That a Longshoreman Injured on the Pier During the Discharge of Cargo From a Vessel Is Not Entitled to the Same Protection as a Longshoreman Injured Aboard the Vessel, the Court of Appeals for the First Circuit Has Decided an Important Question of Federal Admiralty and Maritime Law That Is Irreconcilable With a Statute of Congress, Authoritative Decisions on This Court and Decisions of at Least Five Other Courts of Appeals.

I. *Unseaworthiness*

In *Seas Shipping Co.* v. *Sieracki*, (1946), 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, this Court extended the humanitarian doctrine of unseaworthiness to longshoremen performing ship's service, which until recent times had been performed by members of the crew. The precise question of whether the same policy applied to longshoremen injured ashore was anticipated and left open in a footnote to the majority opinion:

> "In this case we are not concerned with the question whether the same policy extends to injuries incurred ashore by a stevedore engaged in the same

work, a matter which is relevant however in Swanson v. Marra Brothers, Inc. No. 405, 328 U.S. 1, 66 S. Ct 869, Cf. O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 63 S. Ct. 488, 87 L. Ed. 596."

328 U.S. 85 at p. 100; 66 S. Ct. 869 at p. 880.

Prior to the decision below three other Courts of Appeals did decide the question, and each of them answered it exactly opposite to the way in which it was answered by the Court of Appeals for the First Circuit.

Strika v. *Netherlands Ministry of Traffic*, 2 Cir. 1950, 185 F 2d 555; cert. denied, (1951) 341 U.S. 904, 71 S. Ct. 614, 95 L. Ed. 1343.

Pope & Talbot, Inc. v. *Cordray*, 9 Cir. 1958, 258 F 2d 214.[1]

American Export Lines, Inc. v. *Revel*, 4 Cir. 1959, 266 F 2d 82.

The bench and bar apparently have interpreted this Court's denial of certiorari in the *Strika* case as an affirmative answer to the question left open by the footnote quoted above from *Sieracki* because when a case involving an injured shore-based longshoreman arose in the Court of Appeals for the Third Circuit, neither the lawyers nor the Court raised any question about the longshoreman's right to recover.

Hagans v. *Farrell Lines, Inc.*, 3 Cir. 1956, 237 F 2d 477.

[1] The longshoreman's duties in this case were primarily ashore but he was injured aboard. The Court stated: "We hold that the duty of providing a seaworthy ship and gear at the time of this accident extended to the appellee, whether or not appellee was on board the ship or on the dock." 258 F 2d 214, 218.

None of the Courts of Appeals have ever questioned that the discharge of cargo was historically the work of seamen. Indeed, there would be no reason to question that proposition.[2]

In *Strika*, Judge Learned Hand, synthesized the three opinions of this Court referred to in the quotation at the outset of this argument.

> *Seas Shipping Co.* v. *Sieracki*, (1946), 328 U.S. 80, 66 S. Ct. 872, 90 L. Ed. 1099;
>
> *Swanson* v. *Marra Brothers, Inc.*, (1946), 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045;
>
> *O'Donnell* v. *Great Lakes Dredge and Dock Co.*, (1943), 318 U.S. 36, 63 S. Ct. 488, 87 L. Ed. 596.

O'Donnell held that a seaman injured ashore in the course of his employment could recover against his employer, the shipowner, under the Jones Act, 46 U.S.C.A. 688; *Swanson*, however, held that a longshoreman injured ashore could not recover against his employer, the stevedore, under the same statute, because Congress had limited the remedy against the stevedore-employer exclusively to compensation. 33 U.S.C.A. 901, *et seq.* But, on the same day that this Court decided *Swanson*, it also decided *Sieracki*, in which the doctrine of unseaworthiness was extended to longshoremen in actions against the shipowner as a third party.

From the teachings of these decisions, Judge Hand concluded that a longshoreman injured ashore (as was the seaman *O'Donnell*) could recover for unseaworthiness against the shipowner (as could the longshoreman *Sieracki*). Judge

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[2] Jacobsen, *Laws of the Sea* (1819); *Dixon* v. *The Cyrus*, (D. Pa., 1789) 7 Fed. Cas. 755, Case No. 3,930; *Cloutman* v. *Tunison* (Cir. Court, D. Mass., 1833), 5 Fed. Cas. 1091; *The Hudson*, (W.D. Pa., 1881) 6 Fed. 830; *The Circassion*, 1 Ben. 209, Fed. Cas. No. 2,722 (1867); *Gilbert Knapp*, 37 Fed. 209 (1889).

Swan dissented solely because he felt that any extension of the doctrine of unseaworthiness to shore-based longshoremen should be decided only by this Court. Despite that dissent this Court refused to review.

341 U.S. 904, 71 S. Ct. 614, 95 L. Ed. 1343.

Between the date of the accident of *Strika* and the decision of the Court of Appeals, Congress enacted the Extension of Admiralty and Maritime Jurisdiction Act, 46 U.S.C.A. 740. Judge Hand felt that in all cases that arose after the enactment of that statute, the question had probably been foreclosed because of Congressional Action—and it may be for that reason that certiorari was denied.

Despite the decision of the Court of Appeals for the Second Circuit and the acceptance of this reasoning by the Courts of Appeals for the Fourth and Ninth Circuits, the Court of Appeals for the First Circuit has taken an irreconcilable position. In so doing it ignored the Act of Congress, which was cited by the District Court and fully briefed on appeal.

Recognizing decisions to the contrary (but only District Court cases), the Court below refused to "cross the gangway". By its decision the Boston Court has destroyed the uniformity of the admiralty and maritime law that heretofore had been accepted by the lower federal courts, all of which had recognized the longshoreman's right to recover for injuries sustained ashore.[3]

[3] The two cases cited by the Court of Appeals are inapposite. In *Partenweederei MS Belgran* v. *Weigel*, 9 Cir., 1962, 299 F. 2d 897, the Court found that the libellant, tractor-driver, was not engaged in the type of work traditionally done by seamen, distinguishing *Pope & Talbot* v. *Cordray*, 9 Cir., 1958, 258 F. 2d 214. In *Kent* v. *Shell Oil Company*, 5 Cir. 1961, 286 F. 2d 746, recovery was denied because the injury was caused by a thing which was not a part of a vessel or its appurtenances. In a footnote, the Court of Appeals for the Fifth Circuit stated: "We do not reach this problem specifically and we ex-

Valerio v. *American President Lines*, D.C.S.D.N.Y. 1952, 112 F. Supp. 202.

Litwinowicz v. *Weyerhaeuser S.S. Co.*, D.C.E.D. Pa. 1959, 179 F. Supp. 812.

Di Salvo v. *Cunard S.S. Co.*, D.C.S.D.N.Y. 1959, 171 F. Supp. 813.

Robillard v. *A. L. Burbank & Co., Ltd.*, D.C.S.D.N.Y. 1960, 186 F. Supp. 193.

Hagans v. *Ellerman & Bucknall Steamship Co.*, D.C. E.D. Pa. 1961, 196 F. Supp. 593.

Fisher v. *United States Lines Company*, D.C.E.D. Pa. 1961, 198 F. Supp. 815.

Language in the Court below may also be interpreted to mean that the Court of Appeals for the First Circuit does not believe that the broken condition of the bags of cargo rendered the vessel unseaworthy. If this be the case, the decision below is in direct conflict with authoritative decisions of this Court and decisions of the Courts of Appeals for the Second and Third Circuits.

Ryan-Stevedoring Co., Inc. v. *Pan Atlantic Steamship Corp.*, 1956, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133.

Amador v. *A/S J. Ludwig Mowinckels Rederi*, 2 Cir. 1955, 224 F. 2d 437, certiorari denied, 350 U.S. 901, 76 S. Ct. 179, 100 L. Ed. 791.

Gindville v. *American Hawaiian Steamship Company*, 3 Cir. 1955, 224 F. 2d 746.

Curtiss v. *A. Garcia Y Cia.*, 3 Cir. 1957, 241 F. 2d 30.

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press no opinion on our ultimate determination whether *Strika* v. *Netherlands Ministry of Traffic*, 2 Cir., 1950, 185 F 2d 555, certiorari denied, 341 U.S. 904, 71 S.Ct. 614, 95 L. Ed. 1343, is correct. See also *Pope & Talbot, Inc.* v. *Cordray*, 9 Cir., 1958, 258 F 2d 214; and *Valerio* v. *American President Lines*, D.C.S.D.N.Y. 1952, 112 F. Supp. 202." 286 F 2d 746. Footnote 14 at page 752.

Reddick v. *McAllister Lighterage Line*, 2 Cir. 1958, 258 F. 2d 297.

Rich v. *Ellerman & Bucknall SS Co.*, 2 Cir. 1960, 278 F. 2d 704.

Some of the District Court cases previously cited involved the same combination of factors as did the instant case—unseaworthy cargo and shore-side injuries. All District Judges (including the District of Puerto Rico) relying on the same authorities granted recovery.

Valerio v. *American President Lines*, D.C.S.D.N.Y. 1952, 112 F. Supp. 202.

Robillard v. *A. L. Burbank & Co., Ltd.*, S.D.N.Y. 1960, 186 F. Supp. 193.

Hagans v. *Ellerman & Bucknall Steamship Co.*, D.C. E.D. Pa. 1961, 196 F. Supp. 593.

It is for this Court to now resolve the conflict and confusion created by the decision below.

II. *Negligence*

In addition to reaching fact conclusions different from those reached by the District Court, the Court below reversed the decree insofar as it was based on negligence because the shipowner did not control the situs of the injury. This proposition of law not only vitiates the Extension of Admiralty and Maritime Jurisdiction Act but it is also incompatible with the authority as expressed by this Court and other Courts of Appeals.

The duty of the shipowner heretofore was not only to provide and maintain a seaworthy vessel; he had also to provide a safe place to work and to refrain from injuring one by negligent conduct. Recently, this Court defined the

duty of the shipowner as "exercising reasonable care under the circumstances of each case."

Kermarec v. *Compagnie Generale Transatlantique*, 1959, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550.

That case had to do with a shipboard accident. We may assume that if the decision below is the law, the shipowner need not exercise reasonable care as long as the injured person is injured ashore. But to make the assumption that the decision below is the law, we would have to overturn decisions from other circuits to the contrary.

The Court of Appeals for the Sixth Circuit has held that the failure to post a watchman on board constituted negligence and the resulting injury to the shore-based longshoreman was compensable.

Imperial Oil Limited v. *Drlik*, 6 Cir. 1956, 234 F. 2d 4.

The Court of Appeals for the Third Circuit has held that a shipowner may be liable for negligence in permitting dangerous methods of discharge.

Beard v. *Ellerman Lines, Ltd.*, 3 Cir. 1961, 289 F. 2d 201.

Again, this too, was a shipboard accident. But the decision by that Court and the instant one cannot be harmonized. If the risk defines the duty to be obeyed, the injury to the shore-based longshoreman is just as much within the specific risks of the dangerous discharge methods tolerated by the owner, as is the injury to longshoreman aboard.[4]

[4] Relying on the *Beard* case, in a fact situation similar to the case at bar, a District Court found that the shipowner had provided an unseaworthy vessel, was negligent in permitting a dangerous method of discharge and in failing to provide a safe place to work. *Hagans* v. *Ellerman & Bucknall Steamship Co.*, D.C., E.D. Pa. 1961, 196 F. Supp. 593.

The Court of Appeals for the Second Circuit has ruled that a condition created on the pier by the negligent discharge of cargo is compensable if a seaman is injured even though the shipowner did not control the pier.

Marceau v. *Great Lakes Transit Corporation*, 2 Cir. 1945, 146 F. 2d 416.

Substituting the petitioner for the seaman, *Marceau*, under the teaching of either *Sieracki* or *Kermarec*, petitioner would be entitled to recover. The conflict created between the Courts of Appeals for the First and Second Circuits by the decision below should be resolved by this Court.

B. In Deciding That the Petitioner's Claim Was Barred by Laches, the Court of Appeals for the First Circuit Has Decided a Question of Federal Maritime Law Directly in Conflict With the Authoritative Decisions of This Court, and the Decisions of Other Courts of Appeals.

In *Gardner* v. *Panama R. Co.* (1951) 342 U.S. 29, 72 S. Ct. 12, 96 L. Ed. 31, this Court stated:

> "Although the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief."

342 U.S. at page 30-31, 72 S. Ct. at page 13.

The trial judge did not apply the statute of limitations[5] mechanically. He determined that there was both excusable delay and that the respondent was not prejudiced. The Court of Appeals disagreed and said that laches barred the action.

The delay in this case was two years, two months and nineteen days from the date of the occurrence.[6] At the trial, eye-witnesses and doctors testified and certain documentary evidence was presented. The respondent introduced an accident report and payroll records which disclosed that the only potential eye-witnesses were the ones actually produced by petitioner. In a deposition and in answers to interrogatories the names and addresses were furnished. Not once in the sixteen months between the filing of the libel and the trial was any attempt made by the respondent to contact these witnesses or to find out what happened. Their testimony was believed by the Trial Court.

In addition to these witnesses there were statements and medical records of the State Insurance Fund. The respondent itself introduced all the records proving that the cargo was damaged prior to and during discharge. Respondent obtained a physical examination of petitioner and produced expert witnesses.

The ruling of the Court of Appeals on this issue disregards the pronouncements of this Court and conflicts with decisions in other circuits.

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[5] 11 L.P.R.A. 32.

[6] Analogous statutes of limitations for unseaworthiness are usually longer. Sometimes they are as much as six (6) years. *Le Gate* v. *The Panamolga*, 2 Cir., 1950, 221 F. 2d 689.

The Jones Act, 46 U.S.C.A. 688, has a three (3) year statute of limitations. The discussion by this Court of the application of that statute in a negligence action combined with one for unseaworthiness is illuminating. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 78 S. Ct. 1201, 2 L. Ed. 2d 1272.

Claussen v. *Mene Grande Oil Co.*, 3 Cir. 1960, 275 F. 2d 108.
Vega v. *The Malula*, 5 Cir. 1961, 291 F. 2d 415.

What the Court of Appeals for the Fifth Circuit said in the latter case is pertinent here:

> "What it (the respondent) knows is of no real help. But on this record there is no indication that if it could learn more, it could extricate itself from the inexorable consequences of the American Maritime concept of seaworthiness.
>
> 291 F. 2d at page 420.

The reasoning of the Appellate Court in the instant case would make it impossible to ever apply the equitable doctrine of laches. Unlike the Court of Appeals for the Fifth Circuit, it is willing to mechanically apply limitations to cut off the "awesome consequences" of unseaworthiness.[7] A principle of admiralty law firmly established by this Court eleven years ago has been eroded. The standard in the First Circuit is not the same as in other Courts. A doctrine, the purpose of which was the mitigation of the harsh mechanical application of statutes of limitation, has been perverted to serve as a bar to recovery in an action which in many jurisdictions would not even be barred by limitations.

[7] The dissatisfaction of the Court below with that doctrine was clearly expressed in *Mitchell* v. *Trawler Racer, Inc.*, 1 Cir., 1959, 265 F. 2d 426, reversed (1960), 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941.

C. The Court of Appeals for the First Circuit Has Violated the Standard Set by This Court in Reviewing Findings of the District Court Sitting Without a Jury in Admiralty.

The findings of the District Court may not be set aside unless clearly erroneous.

McAllister v. *United States* (1954) 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20.

In this particular case more than most, this doctrine warrants respect. The witnesses testified in Spanish, a language in which the trial judge is fluent. The opportunity to judge credibility and the importance of demeanor evidence is unique. Nevertheless, from an independent reading of the cold, translated record, the Court of Appeals made independent findings of fact, reversed findings of fact of the trial court which resolved conflicts in the evidence, and determined the weight to be given to exhibits as against testimonial evidence.

The Court below pointedly emphasizes that a bag of beans which the trial court found broke open in mid-air actually broke open upon hitting the dock after a fall from mid-air. Then the Court of Appeals incurs in an error of fact by finding that no conduct in which respondent participated was responsible for the beans on the dock, completely ignoring a specific finding of the trial court and testimony by all of the fact witnesses to the effect that beans were spilling from drafts of broken bags throughout the unloading operations, and corroboration in respondent's Exhibit 10 showing broken bagged cargo.

As a basis for reversal, the Court of Appeals also relies on a prior statement of libelant, allegedly inconsistent with his testimony on trial. In so doing, the Court disregards

the cross-examination to which petitioner was submitted (R. 37-38) in the presence of the trial court and which apparently clarified any inconsistency to the satisfaction of that court, and also disregards the uncontradicted and unimpeached testimony of all the other fact witnesses.

Continuing this apparent trial *de novo*, the appellate court finds that the memories of the witnesses had become impaired because they testified that rice and feed had also spilled from drafts, while respondent's records showed no rice or feed being discharged until after petitioner's accident. The witnesses stated the accident occurred in the afternoon. Respondent's Exhibit 2 indicated the accident occurred in the morning. Not only does the Court of Appeals vitiate the trial court's prerogative of determining the weight to be given to any particular evidence, and the comparative weight of testimonial as against documentary evidence, but it also substitutes the appellate court's conclusion for that of the trial court on a disputed issue.

The Court of Appeals even goes so far as to make a finding of fact contrary to both the testimonial and documentary evidence in the record. The Court states:

> "And while the records did in fact show spilling from the drafts, they showed none near the hatch opposite which libelant was working."

The Court below disregarded the testimony of the witnesses. In this respect it also disregarded respondent's documentary evidence (Exhibit 10) which shows broken bags in all hatches of the vessel except number 5. Petitioner was working opposite number 2.

Once again, as in *Guzman* v. *Pichirilo*, decided by this Court on May 21, 1962 (No. 358, October Term, 1961), the Court of Appeals for the First Circuit has departed from

the standard established by *McAllister* v. *United States*, *supra*, and has reversed findings of fact made by the District Court for the District of Puerto Rico. Those findings were based on substantial evidence and some on uncontroverted evidence. The reversal can be sustained only if the findings were error as a matter of law. In so holding, the Court of Appeals is in direct conflict with the decisions of every other Court of Appeals and District Court that has ruled on the issues of law presented in this case.

Although it may not be the function of this Court to correct mere error by way of certiorari, nevertheless, when a lower court has so openly departed from the judicial standards established and repeatedly invoked by this Court, an exercise of the power of supervision is called for to maintain uniformity and authority in the law.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the First Circuit in this cause and that this Court should review and reverse the decision of the Court of Appeals and reinstate the decree of the United States District Court for the District of Puerto Rico.

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Appendix

United States Court of Appeals

For the First Circuit

No. 5887.

WATERMAN STEAMSHIP CORP.,

RESPONDENT, APPELLANT,

v.

FEDERICO MARIN GUTIERREZ,

LIBELANT, APPELLEE.

[193 F. Supp. 894]

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

Before MAGRUDER*, ALDRICH and SMITH*,

Circuit Judges.

Antonio M. Bird, with whom *Hartzell, Fernandez & Novas* was on brief, for appellant.

Harvey B. Nachman, with whom *Nachman & Feldstein* was on brief, for appellee.

OPINION OF THE COURT.

April 11, 1962.

ALDRICH, *Circuit Judge*. This is a libel by a longshoreman for personal injuries sustained on a dock at which respondent's vessel was unloading, allegedly by reason of "improper storage of cargo on said dock." In addition, there were general allegations of unseaworthiness of the vessel and of negligence of its master, officers and crew. The district court made findings in libelant's favor as to

*Sitting by assignment.

unseaworthiness and negligence and assessed damages. It rejected a defense of laches. Respondent appeals.

The accident occurred on October 21, 1956. Libelant was in the employ of a stevedore unloading respondent's vessel pursuant to contract. The first notice respondent received of the claim and, for all that appears, of the injury[1] was when suit was brought on January 9, 1959. By this date more than twice the period of the analogous statute of limitations had elapsed. The court found, "While working on the dock libelant slipped on [some] beans, twisted his torso and fell upon his buttocks. The injuries sustained by libelant were proximately caused by this unseaworthiness[2] of the vessel, the failure to furnish libelant with a safe place to work and by the negligence of the respondent." With respect to laches the court found that libelant had shown a sufficient excuse by the fact that he consulted counsel within the statutory period, and concluded that respondent was not prejudiced by the delay because the witnesses remained available and respondent had its own "records indicating the cargo damage."

The first question is the responsibility for the beans. The court found that many of the bean bags were defective, that coopers were employed in sewing them up; that nonetheless beans were spilled from the drafts as they were being swung ashore. "On one occasion, according to the records produced by respondent and admitted into evidence, a bag broke open in mid-air spilling its contents all over the dock. This event occurred while a draft from Hold No. 1 was in mid-air and still attached to the vessel. Hold No. 1 is immediately adjacent to No. 2 forward. Beans scattered

[1] Even libelant's employer had no prior notice of the basis of the present claim. Libelant told the State Insurance Fund not that he slipped, as now alleged, but that he fell because he was carried by the sling due to improper action of the winchman.

[2] What was meant by "this unseaworthiness" will be later discussed.

about the surface of the pier caused a dangerous condition for the longshoreman. The cargo being discharged was defective and unseaworthy. The ship owner was negligent in permitting the broken and weakened bags to be discharged, when it knew or should have known that injury was likely to result to persons in the service of the ship who had to work on and about the spilled beans. The condition on the pier was caused by the respondent's unseaworthy cargo and its lack of care. In permitting this condition to remain existent, the respondent failed to furnish libelant with a safe place to work."

The quoted portion of the court's opinion contains several errors. In the first place, the respondent's records do not show that the bag broke open in mid-air, but show that it fell from mid-air, and broke when it hit the deck.[3] Secondly, the bag fell, and beans were spilled, whether from there or anywhere else, by no conduct in which respondent was shown to have participated. *Cf. Robillard v. A. L. Burbank & Co.*, D.C.S.D.N.Y., 1960, 186 F. Supp. 193, 197. And it is undisputed, with respect to "permitting this condition to remain existent" on the pier, that respondent had neither control of nor even a right to control that locus. The court's findings as to respondent's negligence cannot stand.

There remains the finding of unseaworthiness of the cargo. One speaks of unseaworthy cargo really in terms of result: rather, it is the unsafe condition, created by the cargo, which is felt to be a violation of some absolute duty of the shipowner. We recognize, of course, that a shipowner's duty is not to be evaded by calling a man a longshoreman and placing him in someone else's employ. *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U.S. 85. But while

[3] If there could be said to be any ambiguity in the record (which we doubt) it is clearly resolved by reading the entries as to similar occurrences at other hatches.

labels cannot avoid liability, they should not be used to create it. This is not a case of a defective piece of ship's equipment, or of a dangerous condition aboard the ship. Nor is it a case of a claimant whose work carries him both on and off the vessel. At best, lading, which was not part of the ship, which did not make the ship unsafe, and which had left the ship, is being used to impose absolute liability upon the shipowner for a condition caused by the lading to a shore worker. Some may feel this gangway has been crossed. See, *e.g.*, *Hagans* v. *Ellerman & Bucknall S.S. Co.*, D.C.E.D.Pa., 1961, 196 F. Supp. 593; *Fitzmaurice* v. *Calmar S.S. Corp.*, D.C.E.D.Pa., 1961, 198 F. Supp. 304. But it seems to us that to extend such protection disregards the whole origin and purpose of the doctrine of unseaworthiness.[4] True, such a worker may be broadly argued to be in the service of the ship. But not even in a technical sense was he on or about to go "on a voyage." *Pope & Talbot, Inc.* v. *Hawn*, 1953, 346 U.S. 406, 413. His dangers were not the same. *Ibid.* We see no difference to a land employee in source, cause, risk, or effect between beans spilled on a dock, or on a trucking platform, or on a warehouse floor in Denver. The very fact that unseaworthiness obligations are "awesome," *Kent* v. *Shell Oil Co.*, 5 Cir., 1961, 286 F.2d 746, 752, suggests that they should not be handled with prodigality. We are unwilling to recognize one here.

A recent case somewhat close on the facts is *Partenweederei* v. *Weigel*, 9 Cir., February 1962, F.2d . There libelant was a dock worker engaged in driving a tractor

[4] Singularly enough, the doctrine of absolute tort liability for injuries ashore, to the extent that there have been cases, seems to exist solely for the benefit of longshoremen. Whether those decisions represent the independent views of the courts concerned, or are merely thought to be required by those of the Supreme Court, may be problematical. *Cf. Robillard* v. *A. L. Burbank & Co.*, *supra*. But we know that on at least one occasion we ourselves have erroneously exaggerated those views. *New York, N.H. & H. R.R.* v. *Henagan*, 1 Cir., 1959, 272 F.2d 153, *rev'd*, 1960, 364 U.S. 441.

handling lumber on the dock which was about to be loaded onto respondent's vessel. He was struck by a defective ship's boom. The court found that libelant was not performing traditional ship's work within the scope of the obligation of seaworthiness. While the court noted a distinction between cargo not yet connected with the ship's loading gear and cargo actually being loaded, it is in common with us in recognizing limits in this area to principles of absolute liability. In a way the facts were more favorable to libelant than in the case at bar because it was the ship's gear that was defective and not merely cargo previously aboard.

There is a more specific difficulty. The court overruled the defense of laches because it found that libelant had a valid excuse for the delay and because respondent was not prejudiced. The only suggested excuse was that libelant consulted counsel within the statutory period. This has never been regarded as extenuation. *Wilson* v. *Northwest Marine Iron Works*, 9 Cir., 1954, 212 F.2d 510; *Marshall* v. *International Mercantile Marine Co.*, 2 Cir., 1930, 39 F.2d 551; *McGrath* v. *Panama R.R.*, 5 Cir., 1924, 298 Fed. 303. Assuming that absence of excuse is not fatal if there has been no actual prejudice, *but cf. Taylor* v. *Crain*, 3 Cir., 1952, 195 F.2d 163, we think that such lack of prejudice has been shown only in part. The court's first basis, that the witnesses were still available, was not equivalent to an opportunity to examine them at an earlier date. *Cf. Redman* v. *United Fruit Co.*, 2 Cir., 1949, 176 F.2d 713, *s.c.*, 2 Cir., 1950, 185 F.2d 553. It was demonstrated that the memories of these witnesses had become impaired. While they testified to loose beans falling from the drafts, they also testified similarly as to rice and feed. Yet defendant's records, of which the court quite properly made a point in another connection, showed that no rice or feed was discharged until after the accident. And while the records did in fact

show spilling from the drafts, they showed none near the hatch opposite which libelant was working. The testimony as to the defective-bag source of the beans on which libelant was found to have slipped is highly questionable. We think as to this portion of the claim it was error to find that respondent was not prejudiced by the delay.

There is a similar weakness with respect to the evidentiary proof. Libelant cannot recover for beans that spilled from the drafts without some affirmative showing that they were the ones upon which he slipped. With an admitted substantial source of a large quantity of beans—the dropped bag—it seems to us that any finding that libelant fell, instead, on beans which spilled from defective bags on the drafts would be entirely speculative.[5] For either of these reasons we could not recognize a finding that libelant's fall was so caused.

On the other hand, as to the dropped bag, we quite agree that since respondent's own records showed it, respondent was not prejudiced. This, however, does not help libelant. Even if it could be found that libelant slipped on beans from that source, there was no evidence that this bag was defective, or that any defect caused it to drop. For all that appears there may have been improper operation by the winchman. His negligence, as already stated, was not the responsibility of the respondent. Accordingly, there is no basis for supporting a finding for libelant on any theory. Respondent's motion for judgment should have been allowed.

Judgment will be entered vacating the decree of the District Court, and remanding the case to that Court with direction to dismiss the libel.

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[5] Strictly, it must be observed that the court's attributing libelant's fall to beans from defective bags appears to be based primarily on it's mistaken finding that a bag broke in mid-air.